NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Child Support Amendment Bill

24/06/2020

Submission on the Child Support Amendment Bill

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Child Support Amendment Bill (**Bill**).

1.2 The Bill amends the Child Support Act 1991 (**Act**), with the aim of improving administration, reducing complexity, improving fairness and increasing compliance with the child support scheme. The Law Society's submission identifies a few areas where the drafting could be amended to provide greater clarity and certainty for child support applicants and the Commissioner.

1.3 The Law Society does not seek to be heard.

2 Amendments to the Child Support Act

Clause 4 - section 2 amendments (Interpretation)

2.1 There is a minor numbering error in clause 4(2). Clause 4(2) proposes to add a definition of "social security beneficiary" to the Act's section 2(1) definition of "social security benefit", "*after paragraph (d)*". The definition currently contains paragraphs (a) – (f), so clause 4(2) should refer to "*after paragraph (f)*" rather than (d).

Amendments to Part 1 (liability to pay child support under formula assessment)

Clause 6: section 19 amended (When liability to pay child support starts)

Paternity – time limits, discretion to extend

2.2 Section 19(1) provides that liability to pay child support commences either on the date the application for assessment is received, or when the Commissioner determines liability. If the parentage of a child is in question, the applicant will need to apply to the court for a paternity order.

2.3 Clause 6 replaces section 19(3) and inserts new subsections (4), (5) and (6). New sections 19(4)(b) and (6)(b) use the term "outside the applicant's control", in relation to circumstances justifying the Commissioner's exercise of discretion to extend the specified time limits for establishing paternity:

(a) Proposed new section 19(4) introduces a 60-day time limit for applying for a paternity order and providing the order to the Commissioner. If the time limit is met, liability to pay child support is backdated to when the Commissioner received the application for child support. If the time limit is not met, child support is established from the date the paternity order is provided to the Commissioner. The Commissioner has discretion to accept court orders outside of the 60-day time limit if the applicant can prove that the delay was due to circumstances outside the applicant's control.

(b) Proposed new section 19(5) and (6) allows an application for a child support assessment to be made if a person in any proceedings acknowledges that they are a parent of a child and the court has not made an order to the contrary. The assessment can be made by filing the acknowledgement with the Commissioner within 60 days of the application for assessment being made and no later than 60 days after the acknowledgement was made. The Commissioner has discretion to accept acknowledgements outside the time limits if the delay was due to circumstances outside the applicant's control.

2.4 No guidance is provided about what would constitute circumstances "outside the applicant's control", which could become problematic particularly if there is disagreement with the decision of the Commissioner. The Regulatory Impact Statement (**RIS**) for the Bill notes that "… there would be discretion for Inland Revenue to accept orders outside the two-month period if the delay was due to circumstances beyond the carer's control – for example, they were seriously ill".[1]

2.5 The Law Society recommends that clause 6 is amended to provide greater clarity and certainty for applicants and the Commissioner. Section 135B(2)(a) of the Act might provide a useful model; that section defines "reasonable cause" for delay as an event or circumstance that "is beyond the control of the liable person, including a serious illness, an accident, or a disaster".

Amendments to Part 2 (amount of child support payable under formula assessment made by Commissioner)

Clause 8: section 30 amended (Formula for assessing annual amount of child support)

2.6 Clause 8 amends section 30 by the addition of new subsections (3) and (4). The addition of new section 30(4) provides the Commissioner with a discretion to modify the child expenditure amount where there are exceptional circumstances (for example, complex care arrangements for children within a particular child support group) and where applying the provisions of the sections without modification would result in an unjust or inequitable outcome. This should encourage administrative review officers to look more broadly at the individual circumstances of a particular case, rather than follow the current practice which is to recommend an application to the court for departure orders.

2.7 However, as currently drafted, the relationship the new subsections have to schedule 3 is difficult to follow. Subsection (3) provides a change to the definition of one of the components of the child support formula, "e", which relates to the calculation of a child expenditure amount for the qualifying child in respect of whom the calculation is being made, having regard to the child expenditure table in schedule 3. That table considers expenditure across the households of the qualifying parents and has regard to the ages of the children with different expenditure relating to different age groupings.[2] New subsection (3) refers to the situation "if no child expenditure table applies". It is not clear from the section when no child expenditure table would apply. The phrase "no child expenditure table" is not contained in the current Act.

2.8 If the phrase "no child expenditure table applies" means that schedule 3 does not apply because the combination and ages of children living in the household do not fit within the categories in schedule 3, then this should be clearly stated. If something else is meant by the phrase, then new subsection (3) should be amended to provide clarity.

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1 *Regulatory Impact Statement: Child support Business Transformation*, Inland Revenue, 8 August 2019, at p35.

2 The explanatory note to the Bill states that there are 3 main categories of such groupings and an amendment (by clause 49) repeals part of the table which related to a grouping of children where there was at least one child aged 0 to 12 years and one or two children aged 13 or over. The explanatory note states that the intention is that "expenditure calculations should be completed using a child's appropriate age bracket, to address appropriate expenditure allocations between older and younger children…".

2.9 The same recommendation regarding the unclear meaning of "if no child expenditure table applies" is made in respect of clause 12, which similarly amends section 35B (dependent child allowance).

Amendments to Part 5 (assessment of child support and domestic maintenance)

Clause 18: new section 81A inserted (Amendments of assessments arising from living circumstances existing at time initial assessment made)

2.10 Clause 18 inserts new section 81A to provide for amendments to be made to an assessment where the initial assessment is made on the basis of erroneous facts, for example, the assessment is based on certain living circumstances which did not actually exist at the time of assessment. New section 81A only applies where the initial assessment was based on erroneous facts at the outset. (Where there are changes of circumstances occurring during the child support year section 82 continues to apply.)

2.11 New section 81A imposes a time limit on the ability of the Commissioner to backdate any amendment to the date of assessment:

(a) if the advice is given to the Commissioner within 28 days of the notice of assessment, the amendment can be backdated to the date of initial assessment; but

(b) if the advice is given to the Commissioner after 28 days of the notice of assessment, the amendment will take effect only from the date of the advice.

2.12 The only situation where an initial assessment which was based on erroneous facts can be backdated is when the recipient has advised the Commissioner within 28 days. The 28-day timeframe mirrors that in section 82 which enables backdating of assessments to the date of change where notice has been given within 28 days. This provides appropriate consistency across comparable provisions.

2.13 There are no exceptions to the timeframe for backdating, apart from the usual limited exceptions contained elsewhere in the Act such as fraud, death or non-paternity. This is a stricter approach to that which applies to notification of changes of circumstances during the child support year under section 82 – backdating of amendments to the date of change can occur in a range of circumstances as set out in section 82(2)(a). It may be reasonable to extend the limited exceptions from section 82(2)(a)(i) and (ii) to new section 81A, as it is not apparent why those exceptions should not apply.

Amendment to Part 14 (general provisions)

Clause 47: section 218 amended (Meaning of ordinarily resident in New Zealand)

2.14 Clause 47 amends the section 218 definition of "ordinarily resident in New Zealand" for child support purposes. The explanatory note to the Bill states that the intention is "to enable a person's intended movements to be taken into account".

2.15 New section 218(6) to (10) extends the current definition of "*ordinarily resident*". The subsections provide that a child or a person is "*ordinarily resident*" if they are "*personally present*" in New Zealand and "*likely to be ordinarily resident in New Zealand*" and also provides the contrary – a child or person may be "*not ordinarily resident*", if they are "*not personally present*" and "*not likely to be ordinarily resident*".

2.16 As currently drafted the amendment is unnecessarily lengthy and subjective. The Law Society questions whether the new subsections will create unnecessary confusion and suggests that clearer and more concise drafting should be considered.

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